IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 1000 85

CENTRAL STATES ELECTRIC COMPANY,

*Petitioner,*

vs.

CITY OF MUSCATINE, IOWA,

*Respondent,*

and

ELMER E. JOHNSON, for himself and the users of natural gas in the City of Greenfield, Iowa, et al.

## BRIEF OF RESPONDENT, CITY OF MUSCATINE, IOWA, IN RESISTANCE TO PETITION FOR WRIT OF CERTIORARI OF CENTRAL STATES ELECTRIC COMPANY

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### STATEMENT OF CASE.

While admitting, in general, the correctness of the chronological summary of the facts and record as set forth in the first division of the Petition for a Writ of Certiorari, this Respondent respectfully calls the attention of the Court to certain statements in said summary which it believes to be erroneous, and which have a material bearing upon the

In the last paragraph on page 7 of the Petition it is stated that "on September 1, 1943, Central **for the first time** became a party to the proceedings by filing its original petition (R. 106) with the Court of Appeals and it was then granted leave to intervene (R. 115." Elsewhere in the "Summary" the assertion is made, either directly or by inference, that Petitioner was not a party to the original proceeding. Respondent does not so understand the record.

The petition of intervention and amendments thereto filed by Central States Electric Company on September 1, 1943, was ancillary to the proceeding initiated by the Natural Gas Companies in the Court of Appeals for a review of the order of the Federal Power Commission directing them to reduce their rates to the distributing utilities who purchased their gas. Central States Electric Company was one of such distributors, and was as much a party to the proceedings had in the Court of Appeals as any of the other distributing utilities named in the opinion, orders and decree of the Court of Appeals entered on May 22, 1942, (R. 36-46), June 24, 1942, (R. 51-52) and September 3, 1942, (R. 67-80). In the order entered on June 24, 1942, (R. 51-52), the Court expressly reserved sole and exclusive jurisdiction over the disposition of the funds represented by the excess charges collected by the Natural Gas Companies, and in the "Findings of Fact and Conclusions of Law and Decree" filed September 3, 1942, the Petitioner, Central States Electric Company, is listed among the distributing utilities whose customers were entitled to refunds. (R. 68). If the Petitioner was not a party to these proceedings, it is difficult to understand why the Clerk of the Court of Appeals should address an inquiry to it on June 11, 1942, with respect to the fund in the possession of the Court, and why the Petitioner should have made such an elaborate reply to the Clerk's inquiry. (R. 56-59).

Actually, the Petitioner did not by its petition of intervention filed September 1, 1943, become a new party to the

proceedings, but merely asserted a claim to the fund as against its customers to whom the same had been allocated by the decree of the Court, approximately a year after the filing of the decree and more than fourteen months after the filing of its letter to the Clerk on June 30, 1942, in which it asserted the same claim.

## SUMMARY OF ARGUMENT.

1. The Petition for a writ of certiorari presents no questions of law or fact and raises no issues which require a review by this Court of the proceedings had in the Circuit Court of Appeals.

2. The Court of Appeals had full jurisdiction to deal with the entire amount of the fund created by the excess charges collected by the Natural Gas Companies after the rate order of the Federal Power Commission became effective, and to direct its distribution to the ultimate consumers of the gas, for whose benefit the order was entered, regardless of where such consumers resided; and the exercise of such jurisdiction did not constitute a regulation of the contractual relationship between the local distributors and the ultimate consumers of the gas.

3. Under the Natural Gas Act the Federal Power Commission could act and did act only in the public interest, and in behalf of the ultimate consumers of the gas produced and sold by the Natural Gas Companies, and not for the benefit of the distributing utilities, and the fund arising out of excess charges during the pendency of the litigation belongs of right to such ultimate consumers.

4. The Court of Appeals has fully exercised its jurisdiction over the fund in dispute.

5. The Petitioner has no right or interest, either legal or equitable, in the fund in question.

6. The City of Muscatine, Iowa, may lawfully administer

the fund directed to be paid to its Treasurer by the Order of the Court of Appeals dated February 14, 1944, in behalf of its citizens who are customers of the Petitioner.

## ARGUMENT.

**1. The Petition for a writ of certiorari presents no questions of law or fact and raises no issues which require a review by this Court of the proceedings had in the Circuit Court of Appeals.**

It is a well settled rule of this Court that while jurisdiction to review judgments or decrees of the circuit court of appeals by the extraordinary writ of certiorari under the statute is a jurisdiction to be exercised entirely in the discretion of the Court, it will be exercised sparingly, and only in cases of peculiar gravity and general importance. This Court said, in Forsythe v. Hammond, 166 U. S. 506:

> "This court, while not doubting its power, has been chary of action in respect to certioraries. * * * Only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation, demand such exercise" of the power to issue certiorari, will the writ be issued.

None of the grounds urged by Petitioner for the issuance of the writ is sufficient to warrant the exercise of its power to do so by this Court. Petitioner concedes that the Court of Appeals had jurisdiction of the fund in question, and complains only that it declined to award the same to it instead of to the ultimate consumers. Its claim upon the fund as set forth in its petition of intervention and the amendments thereto, is based upon allegations which might with equal cogency have been urged by all of the distributing utilities who disclaimed any interest in the funds

which came into the hands of the court. There is nothing in the allegations of the petition of intervention filed in the Court of Appeals, nor in the petition for writ of certiorari, which distinguishes the position of the Petitioner from that of the other utilities who purchased gas from the Natural Gas Companies, and the Court of Appeals properly denied the intervention and thereafter made an order with respect to the disposition of the fund which was entirely within its jurisdiction and consistent with all other proceedings had in the litigation, including the decision of this Court. Certainly no matter of general importance, or one which affects the interest of the nation, is involved here, and we respectfully submit that the petition should be denied.

**2. The Court of Appeals had full jurisdiction to deal with the entire amount of the fund created by the excess charges collected by the Natural Gas Companies after the rate order of the Federal Power Commission became effective, and to direct its distribution to the ultimate consumers of the gas, for whose benefit the order was entered, regardless of where such consumers resided; and the exercise of such jurisdiction did not constitute a regulation of the contractual relationship between the local distributors and the ultimate consumers of the gas.**

We do not understand that the Petitioner is now challenging the jurisdiction of the Court of Appeals to deal completely with the fund which came into its hands as the result of excess charges collected by the Natural Gas Companies during the period covered by the stay orders and until the decision of this Court was filed, but is complaining only of the manner in which that jurisdiction has been exercised, insofar as the particular fund under consideration is concerned. In that connection Petitioner asserts, in effect, that the Court of Appeals by its orders of February 14, 1944, undertook to determine without supporting evidence that the burden of excessive rates paid by the local distributors involved was actually borne by the ultimate

consumers of the gas, and that such orders amounted to a regulation of the contractual relationship between such local distributors and their customers. It seems to us this is a misinterpretation of the orders and the effect thereof, when viewed in the light of the whole record. *

In its Opinion filed May 22, 1942, (R. 36-46), the Court of Appeals declared that "responsibility for proper disposition of all excess charges is, under the original jurisdiction of this court and its ancillary powers as a court of equity, mandatory upon us; it is placed upon us and upon us alone. We deem it our duty to retain jurisdiction and, as a court of equity, to determine to whom and in what amounts the distribution shall be made". (R. 45). Thereafter and on June 30, 1942, the Court filed a "Memorandum on Methods of Making Refunds to Customers of the Peoples Gas Light and Coke Company," (R. 50-63) in which reference is made to the fund now claimed by Petitioner, and it there stated its holding that all refunds which petitioners (Natural Gas Companies) must make, belong to the consumers. In that connection the Court said:

> "Associated with this problem of costs, one utility serving Nebraska City asks that the refund go to it and not to its customers. That it and others may know and plan accordingly, we express our conclusion, and our holding, which is **all refunds which petitioners must make, belong to the consumers,** for whose benefit these proceedings were instituted. The utilities with whom petitioners contracted, were merely conduits, by which natural gas transported by petitioners was delivered to customers by utilities. The refunds do not belong and should not go to the utilities. The price paid by the utilities was fixed by contract. It, together with cost of services and interest, etc., was what made up the utilities bill to their consumers. * * * The proceedings which were instituted by Federal Power Commission and furthered by the Illinois Commerce Commission to reduce the natural gas cost to the utilities were for the benefit of the consumers. They so declare. Most

of the utilities have steadfastly disclaimed any right to or interest in the refund. They realize that the proceedings were for the benefit of the consumers, not to enrich them. An exception is the Nebraska City utility, which believes it is the beneficiary of a windfall, to which it intends to hold on, if once it can get possession of it. It entertains the old and out-moded conception of utility magnates and utility counsel which overlooked the trustee status of a public utility, whose excuse for existence is service to the public to whom it owes the duty to diligently endeavor to render ever better service at lower rates, as well as to earn a fair return on the capital invested in it. In fact it was the position of counsel for the Pipeline Company in the U. S. Supreme Court that under no circumstances could the utility claim any refund and that if anyone was entitled to the refund, it would be the consumers."

And in dealing with the contention of Petitioner that a refund to the consumers constitutes an interference by the Court with the contractual relationship existing between a local distributor of natural gas and the ultimate consumers of such gas, the Court further said (R. 63):

"A public utility located in Nebraska City and another located in Iowa held contracts with petitioners. As between the two contracting parties, their contract would be binding, but the business of the petitioners was subject to regulation by the Federal Power Commission and also in part by the Illinois Commerce Commission. These two bodies sought to reduce charges to the consumers. As between petitioners and utilities they were not interested, but these boards were interested in reducing charges to the consumers. For the consumers the Federal Power Commission acted. Petitioners so understood the nature of the contract and defended on the ground that they had no contract with these consumers and owed nothing to them as consumers, — nor were they subject to Federal regulation for the consumer's benefit. Nebraska City and all other utilities stood by and accepted the situation as it was tendered by the

> pleadings and the parties. Now one or two of these utilities located where no state supervisory commission exists, are endeavoring to seize the fruits of the litigation brought for the consumers and retain the money for their own individual gain. It would be a gross travesty upon the proceedings, the outcome if they were to succeed. With their efforts in this respect, we have no sympathy. The court will make an order on this finding that the money refunded by petitioners belongs to the consumers and none belongs to the utility or utilities."

It seems to us that the quoted language clearly states the respective positions of the utilities and the consumers with respect to the fund in dispute, and needs no further elaboration.

**3. Under the Natural Gas Act the Federal Power Commission could act and did act only in the public interest, and in behalf of the ultimate consumers of the gas produced and sold by the Natural Gas Companies, and not for the benefit of the distributing utilities, and the fund arising out of excess charges during the pendency of the litigation belongs of right to such ultimate consumers.**

It is argued by Petitioner that while Section 1 (b) of the Natural Gas Act declares that the business of transporting and selling natural gas in interstate commerce for ultimate distribution to the public is affected with a public interest, yet the Act contains no provisions indicating that rates charged by natural gas companies in excess of rates fixed by the Federal Power Commission shall be refunded to the ultimate consumers, and then cites a portion of Section 4 (e) of the Act in support of its contention that the fund should be paid to the utilities. We do not believe this construction of the statute is valid.

If the contention of Petitioner is correct, the Natural Gas Act would become a nullity so far as the public interest is concerned, since the benefit of any rate reduction ordered by

the Federal Power Commission and which became the subject of litigation would never reach the ultimate consumer until **after** the validity of such order had been finally adjudicated in the courts, and in the interim the excess charges collected by the natural gas companies would accumulate for the enrichment of the distributing utilities, such as Petitioner, notwithstanding the fact that they were at the same time collecting such excess charges from their customers, under rate schedules in effect before the reduction was ordered by the Power Commission. True, Section 4(e) of the Natural Gas Act does require the natural gas companies, in the event that the increase their rates, "to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and upon completion of the hearing and decision, to order such natural gas companies to refund, with interest, the portion of such increased rates or charges by its decision not found justified." This is by no means the same thing as a refund of excess charges which the Power Commission has ordered to be reduced, as in this case, and which excess charges are incorporated in existing rate schedules and thereby passed on to the consumers. With the exception of the Petitioner and the Nebraska City utility, all of the distributors who purchased gas from the Natural Gas Companies recognized the justice of the proposition that this fund should be returned the ultimate consumers, and the contention of Petitioner that its rate schedules in the City of Muscatine were not subject to the control or supervision of a state commission, but were established by it to meet competition, in no way alters or affects the fact that it did, during the refund period, collect from its customers in Muscatine for gas used by them upon the basis of a rate schedule adopted, freely and voluntarily and by agreement with the City Council of the City, while the excess charges were being collected by the Natural Gas Companies, and which rate schedule was unquestionably based upon the price paid by Petitioner to

the Natural Gas Pipeline Company for the gas it sold to Muscatine consumers.

It would be strange indeed if the action of the Power Commission in reducing the rates of the Natural Gas Companies to the distributing utilities could enure to the benefit of the consumers living in states which have supervisory commissions, but such benefit would be denied to those members of the gas using public who resided in states which do not have such commissions. The Court of Appeals rightly refused to place such an absurd construction upon the Natural Gas Act in its denial of the petition of intervention filed by Central States Electric Company.

**4. The Court of Appeals has fully exercised its jurisdiction over the fund in dispute.**

In Division C of its argument, on page 22 of the brief, petitioner avers that "it was the mandatory duty of the Court of Appeals to retain jurisdiction of and determine who was equitably entitled to the fund here in dispute."

We respectfully submit that the Court did just that, in its order of February 14, 1944. That order expressly finds that a part of said refund, in the proportions later set out, belongs to the consumers of gas residing in the Cities of Muscatine, Greenfield, and Knoxville, and Pella, all of the State of Iowa, the total amount being $25,708.54, and then directs the payment of specific portions of such total to the Treasurers of the various municipalities, the amount to be paid by the Clerk of the Court to the City Treasurer of the City of Muscatine being the sum of $20,823.00. The fact that the order recites that the petition of intervention filed by the Petitioner has been denied without prejudice to said Central States Electric Company's making a claim for said moneys in the hands of the City Treasurers, does not in any way alter the fact that the Court has placed the funds in the hands of the respective Treasurers for the use

of the consumers, to be distributed to such consumers in the same manner as the balance of the refund coming into the hands of the Court.

**5. The Petitioner has no right or interest, either legal or equitable, in the fund in question.**

We have already discussed this proposition to some extent under nos. 2 and 3 of this argument. Petitioner claims that it has a legal right to the fund because it paid the excess charges in the first instance to the Natural Gas Company. However, those charges were reflected in its rate schedules in effect in the City of Muscatine during the period covered by the refund, and its customers there paid for gas upon the basis of the rates paid by it to the Natural Gas Company. Notwithstanding the fact that Iowa has no supervisory utility commission, it will not be denied that the gas rate schedules adopted by the City Council of the City of Muscatine were the result of negotiation between the Council, acting for the citizens of Muscatine, and the utility, and were not arbitrarily forced upon the utility by the Council. Petitioner averred, in its petition of intervention, that the rate schedule adopted in Muscatine was voluntarily reduced by it at various dates between August, 1936, and February 4, 1943. Such action is hardly consistent with its claim that the rates in effect in Muscatine were inadequate to furnish a proper return upon the capital invested. In this connection, it should be noted that there is no evidence in the record that Petitioner ever invoked the aid of the Power Commission to secure a reduction in the rates it was paying the Natural Gas Pipeline Company, nor did it ever take any other action in that direction. It was a party to the original proceeding, however, in the same manner as the other distributors who purchased gas from the Natural Gas Companies were parties thereto; it addressed a letter to the Clerk of the Court of Appeals setting forth its claim to the fund, in June, 1942, but thereafter did nothing further to present its claim to the Court

until fourteen months later, on September 1, 1943, when it filed its petition of intervention.

Petitioner says that it is the only party in privity of contract with the Natural Gas Companies, and for that reason is the legal owner of the refund. In the case of **Ex parte Lincoln Gas & Electric Co. 256 U. S. 512**, in which a bond had been filed conditioned for payment of the excess rate, and the city and its officials were representatives of the consumers, this Court said:

> "The contention that the jurisdiction fails because the consumers were not parties to the record nor in privity with the parties, and the company prayed no relief against them, is transparently unsound. The ordinance was intended to limit the gas rate for the benefit of the consumers; suit was brought against the municipality and its officers as the public representatives of the interests of the consumers; the restraining order and temporary injunction were intended for the very purpose of enabling the company to exact, pending the suit, rates in excess of those limited by the ordinance; the equitable duty to refund excess charges if the suit should fail was a duty owing to the consumers; and the form of the supersedeas bond recognized all this, and was particularly designed for their protection."

Substantially the same situation exists in this proceeding, and the Court of Appeals correctly refused to adopt Petitioner's theory of the ownership of the fund.

**6. The City of Muscatine, Iowa, may lawfully administer the fund directed to be paid to its Treasurer by the Order of the Court of Appeals dated February 14, 1944, in behalf of its citizens who are customers of Petitioner.**

Some question is raised by Petitioner as to the authority of the City of Muscatine, Iowa, through its Treasurer, to take the fund as directed by the order of the Court entered February 14, 1944. Upon this point we deem it sufficient to

ay that under the statutes of Iowa, and particularly Section 6143 set out in the Appendix to Petitioner's Brief, ities and towns, including cities under special charter, such s Muscatine, have power to act for and represent their itizens in the regulation of rates and service of public utilties of all kinds, and to adopt ordinances fixing such rates. f they may act for their citizens in such matters, no good eason suggests itself why they should not be competent o act for their citizens when, as customers of a utility, hey become entitled to a refund from such utility, and where the number of such customers is large and the amount f their individual interest in the refund is small.

It is respectfully submitted by this respondent that the etition for a writ of certiorari filed by Central States Electric Company should be denied.

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